THE CONVEYANCE OF LANDS BY ONE WHOSE LANDS ARE IN THE ADVERSE POSSESSION OF ANOTHER.

WHERE a person, whose land is in the adverse possession of one claiming a freehold, attempts to convey the land without first terminating the adverse holding, there is much diversity of authority as to the result. A statement of the various rules and an historical review of the reasons for them is here attempted.

English Law Prior to the Pretended Title Act of 1540.

The basic idea of the old system of land laws was seisin,[1] at least after the word seisin ceased to cover all kinds of possession,[2] and became only the possession of one who, by right or by wrong, had a freehold estate in the land. We must, therefore, at the outset get a clear idea of seisin and also of disseisin and the other forms of adverse possession known to the old law.

Seisin was a feudal word. He who had seisin by virtue thereof performed the feudal duties and enjoyed the rights of tenure that went with estates thought worthy to be held by a freeman, *i. e.*, those that went with estates of freehold.[3] "The man who is seised is the man who is sitting on land";[4] he is the man who, in the eyes of the feudal law, was the representative of the land for the time being, and as such owed fealty and performed homage. Lord Mansfield defines seisin, substantially, as that which was handed over by the ceremony of livery of seisin, which was the ceremony of feudal investiture;[5] but that definition is not helpful except to show that, because livery of seisin was necessary only where freehold estates were created or transferred, seisin is a word used properly only where freehold estates are involved. A much better

[1] "In the history of our law there is no idea more cardinal than that of seisin." Pollock and Maitland, Hist. of Eng. Law ii. 29.

[2] That early in the law seisin meant only possession, see Pollock and Maitland ii. 31 ff.; Williams, Real Property, 17th ed., 35.

[3] Day *v.* Solomon, 40 Ga. 32, 33-4.

[4] Pollock and Maitland ii. 29.

[5] "Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass." Taylor *v.* Horde, 1 Burr. 60, 107.

definition is the following: "It is only a possession, coupled with an actual claim of a freehold, or possession under such circumstances that the law presumes such a claim, which amounts to a seisin. . . . Seisin, then, may be defined to be possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold." [1] So, too, the possession itself may be actual or implied by law. Where the possession is actual we have seisin *in deed* or *in fact;* where it is implied by law, we have a right of immediate possession of land treated as possession, so as to give seisin *in law.* Seisin in law was thus a fictitious or constructive seisin which the law recognized in an heir or devisee the very moment the ancestor or testator died, or in the remainder man or reversioner on the death of the life tenant in possession.[2] While seisin in law was good for some purposes, it was so slight a thing that when the heir, for instance, entered and thereby obtained seisin in fact, the latter seisin forthwith merged and put an end to the seisin in law, *i. e.*, the right of immediate possession of the freehold was swallowed up in the actual rightful possession. The fundamental idea about seisin was that while there were two kinds, there could be at a given moment for a given piece of property only one seisin,[3] and only one kind.

Disseisin was the wrongful taking away from the real owner of his actual seisin. "Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold and performed the acts of the freeholder and appeared in that character in the lords' court;" [4] or, as Lord Mansfield put it: "Disseisin, therefore, must mean some way or other turning the tenant out of his tenure and usurping his place and feudal relation." [5] How this was accomplished originally, unless the lord conspired with the disseisor, we do not know.[6] It is sufficient for

[1] Towle *v.* Ayer, 8 N. H. 57, 58–9.

[2] In Bracton's time there could be a vacant seisin. The fiction of seisin in law came later. Pollock and Maitland ii. 60.

[3] 1 Wash., Real Property, 6th ed., 54, § 95.

[4] Lord Ellenborough in William *v.* Thomas, 12 East 141, 155. See 4 Kent Com. 482.

[5] Taylor *v.* Horde, *supra,* at p. 107.

[6] "From what we know of the feudal law it does not appear how a disseisin could be effected without the consent or connivance of the lord; yet we find the relationship of lord and tenant remained after the disseisin. Thus, after the disseisin the lord might release the rent and services to the disseisee; might avow upon him; and if he died, his heir within age, the lord was entitled to the wardship of the heir." Hargrave and Butler's note to Litt. § 448.

our purpose that disseisin was early possible, and that every wrongful taking of seisin from the real owner was not necessarily a disseisin. That only was disseisin, where some one entered upon and ousted one who had taken actual possession under claim of freehold.[1] Certainly this was true of actual disseisin, though there was a disseisin by election, where persons, to avail themselves of the remedy by assize, frequently were allowed to suppose or admit themselves to be disseised when they were not.[2] Whatever may be true of the law of to-day, there was in the early common law a clear distinction between disseisin and other forms of adverse possession; for unless actual seisin was interfered with, or could be regarded as interfered with for the purposes of the action, there was no disseisin, though there might perhaps be an abatement or some other form of adverse possession.

From disseisin we pass to the other forms of adverse possession. Putting an end to seisin in law by wrongfully taking actual seisin constituted the kinds of adverse possession known as abatement and intrusion, while there were also other kinds of adverse possession known as discontinuance and deforcement.

A stranger's unlawful entry under claim of freehold and retention of possession of land which had descended to an heir or passed to a devisee who had not yet entered was known as abatement. He did not disseise the heir or the devisee, because they did not have actual seisin, but he entered upon the vacant possession and abated, *i. e.*, overthrew, the freehold of the heir or devisee,[3] who then had a right of entry as well as of action.[4]

Intrusion was of two kinds: the first was the same as abatement, except that it concerned the remainder man or reversioner after

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[1] 3 Bl. Com. 169; Co. Litt. 153 b.; Litt. § 279; 4 Kent Com. 482.

[2] Curiously enough, Lord Mansfield extended the meaning of disseisin by election to cover the case of an owner refusing to consider himself disseised, where, by the early law, he actually was disseised. "In Taylor *v.* Horde, 1 Burrow 60, the principles of the common law were ably shown by Mr. Knowler to be, that a wrongful possession by a stranger and feoffment by him passed to the feoffee an actual immediate estate of freehold, with all its rights and incidents, defeasible only by the lawful owner, whose right of entry, however, was taken away by a descent cast on the heir of the feoffee. Lord Mansfield, however, held that mere acts of intrusion or trespass, followed by a feoffment, could not thus turn the lawful owner into a disseisee, unless he should elect to consider himself disseised, and this doctrine has been since generally adopted in the English cases (Jerrett *v.* Weare, 3 Price 575; Goodright *v.* Forrester, 1 Taunt. 578; Doe *v.* Lynes, 3 B. & C. 388), notwithstanding the earnest stand made against it by Mr. Preston and Mr. Butler. Preston on Abstracts 279; Butler's note to Co. Litt. 330 b." Rawle, Covenants for Title, 5th ed., § 38, note.

[3] 3 Bl. Com. 167-8.

[4] 3 Bl. Com. 175.

the death of the life tenant in possession; and the second was the same as disseisin except that the would-be disseisor, or the ousted party, was the king. In the first there could be no disseisin, because the remainder man or reversioner did not have actual seisin. In the second there could be no disseisin, because the king could not take the subject's seisin, for that was held of the king and the king could hold of no one, while a subject could not take the king's seisin, for a subject must hold of the king, whereas the king's holding was allodial.[1] In intrusion, as in abatement, the dispossessed party had a right of entry as well as of action.[2]

A feoffment by a tenant in tail in fee or in tail, or for the life of the feoffee was a discontinuance. So, too, prior to the Statute 32 Henry VIII, c. 28, the alienation of a husband seised *jure uxoris* worked a discontinuance of the wife's estate. Moreover, "a discontinuance is the effect of a disseisin, when, on certain events, the person disseised has lost his right of entry upon the disseisor and can only recover by action."[3] Where the tenant in tail worked a discontinuance, that meant that on his death neither the heir in tail, nor those in remainder or reversion, could enter, but instead they had only a right of action, requiring strict proof.[4]

Deforcement, while broad enough to include disseisin, abatement, intrusion and discontinuance, had also a narrower meaning when discriminated from them: "Such a detainer of the freehold from him that hath the right of property but never had any possession under that right, as falls within none of the injuries which we have before explained."[5] It covered, for instance, the case where the entry was originally lawful but the detainer has become unlawful, *i. e.*, where a lessee for years, after the expiration of his term, refuses to deliver up the possession.[6] In deforcement, as in

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[1] Taylor *v.* Horde, *supra*, at p. 109. Webb *v.* Marsh, 22 Can. Supreme Ct. 437, 441.

[2] 3 Bl. Com. 175.

[3] Hargrave & Butler's note to Litt. § 448.

[4] 2 Bl. Com. 198; 3 Bl. Com. 171–2.

[5] 3 Bl. Com. 172–3.

[6] 3 Bl. Com. 173. Later, with reference to fines and the statutes of limitation, adverse possession was discriminated in English law from disseisin without being called deforcement. For instance, it was held that a tenant at sufferance could not be a disseisor since his entry was not wrongful. Doe *v.* Perkins, 3 M. & S. 271. See Doe d. Souter *v.* Hull, 2 D. & R. 38. Yet, where it was wrongful for him to stay in possession he could acquire title by adverse possession under the statute of limitations, since there the question was wholly one of whether the possession was inconsistent with a freehold in the real owner. Doe *v.* Gregory, 2 Ad. & E. 14. See Cholmondeley *v.* Clinton, 2 J. & W. 1, 164. So a lease by a stranger and entry by the lessee was not

discontinuance, there was no right of entry, but only a right of action.[1]

The terms having been defined, our first question is: Could the disseisee of lands convey them during the disseisin? Because at a given moment only one seisin was possible for a given piece of land, and because to make a valid conveyance of a freehold at common law it was necessary for the feoffor to hand this seisin over to his feoffee by the ceremony known as livery of seisin,[2] this question of whether a disseisee could convey during the disseisin necessarily has very narrow limits. Indeed the limits are so narrow that the general impression is that the question is not debatable.

So far as the ceremony of livery of seisin *in fact* is concerned, *i. e.*, livery of seisin where the parties actually went on the ground and there made the conveyance and performed the ceremony, the question certainly is not debatable; for the entry by the disseisee for the purpose of the conveyance restored his seisin and so took away from him the character of a disseisee.[3] Where there were several in possession only the one who had the legal title had the seisin;[4] and while livery in deed required the delivery to the feoffee of what was known as a vacant possession, that seemingly was complied with where all persons who had any "lawful" estate or possession in the land conveyed joined in or consented to the livery or else were absent from the premises.[5]

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a disseisin in fact, without an entry by force or an avowed intention to disseise. Jerrett *v.* Weare, 3 Price 575. But in 1833 by the Real Property Act of 3 and 4 Will. IV, c. 27 (amended in 1874 by 37 and 38 Vict. c. 57) the distinction between adverse possession and disseisin was ended in England. Nepean *v.* Doe d. Knight, 2 M. & W. 894; see Culley *v.* Taylerson, 3 Per. & Dav. 539. Under that act one gets title by limitation, not by virtue of adverse possession, but in general because certain fixed times have elapsed since the former owner acquired rights of entry, distress or action.

[1] 3 Bl. Com. 175.

[2] Livery of seisin was the formal delivery of possession necessary at common law where one, who by right or by wrong, had a freehold estate, conveyed to one who was to take a freehold estate. It should be discriminated from the feoffment of which it was a part. A feoffment included both (1) a livery of seisin, *i. e.*, an outward symbolic transfer of that possession which goes with a freehold, and (2) a statement in the form required by law of the precise freehold estate granted. The livery transferred the possession; the statement of the estate granted fixed the rightful limits of that possession, or, in other words, defined the feoffee's title. Williams, Real Property, 17th ed., 139.

[3] Co. Litt. 48 b, 49 a; see Knox *v.* Jenks, 7 Mass. 488.

[4] Litt. § 701; see Barr *v.* Gratz, 4 Wheat. (U. S.) 213, 223; 4 Kent Com. 482.

[5] Shep. Touch. 213. It was because of the need of giving a vacant possession that

But what about livery *in law?* There the feoffment was made not on the land, but in sight of it. Where a feoffment with such livery was made it was ineffective unless the feoffee actually entered during the life of the feoffor,[1] or unless, not daring to enter for fear of his life or bodily harm, he made yearly his "continuall claime"[2] in due form of law as near the land as possible;[3] but if the feoffee entered in the lifetime of the feoffor, or in a proper case made due continual claim, it would seem, on principle, that he would get title even if the feoffor was disseised at the time of the feoffment.[4] If the feoffee actually entered on the disseisor he would wrest the seisin from the disseisor and have it as effectually as if the disseisee had entered before the feoffment,[5] while, if the feoffee made duly his continual claim he would accomplish the same result, because such continual claim constituted an entry in law, "which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong."[6] Neither Littleton nor Coke appears to discuss this case of a disseisee conveying by livery in law; but that is probably because they never knew such a case to arise.[7] Such a conveyance

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"if a man entered and made a feoffment, the owner being upon the land, the feoffment was void." 1 Wash., Real Property, 5th ed., 35, § 78.

[1] "The death of either party [before entry] I agree would make it [livery in the view] void; for if the feoffor dies his heir is in by descent; if the feoffee dies and his heir enter, he must be a purchaser, which he cannot be by the feoffment not being made unto him, and by descent he cannot claim because his ancestor not entering, he was never seised." Poll. 48.

[2] Continual claim was abolished in England by the Statute 3 and 4 Will. IV, c. 27, § 11.

[3] 2 Bl. Com. 316.

[4] Where Sheppard's Touchstone, speaking "Of a Grant" said: "And therefore if a man have disseised me of my land, or taken away my goods, I may not grant over this land or these goods until I have seisin of them again" (Shep. Touch. 240), the language clearly had no application to feoffments, but only to grants. Besides, coming after Coke on Littleton, the author of Sheppard's Touchstone is subject to the comments on Coke made in note 7 *infra*.

[5] "Where a man that hath title to enter, comes into possession, the law doth execute the estate to him." Argument of Pollexfen in Parsons *v.* Perns, 1 Mod. 91.

[6] As Littleton expresses it, where one entitled to make a continual claim makes it, "Presently by such claime hee hath a possession and seisin in the lands as well as if hee had entered in deed, although hee never had possession or seisin of the same lands or tenements before the said claime." Litt. § 419. See also 3 Bl. Com. 175.

[7] As late as Trinity Term, 28 Hen. VIII — a number of years after the death of Littleton — Shelley, J., said: "And no man ever saw a livery by the view unless for a cause material to suppose in enforcing the matter: as if to say that land was on the other side of the Thames to which the feoffor could not come for the water; or at the door of a church, when a man endows his wife of land within the view, it is well

was clearly possible under the principles which they laid down,[1] and a strong argument in favor of its legality is found in the fact that while livery in deed required, as we have seen, the delivery of a vacant possession, the absence from the land of those having estates therein, or their consent if on the land, was not necessary in the case of livery in law.[2] It would therefore seem as if at common law, despite the general assumption to the contrary, a disseisee by a feoffment made with livery in law could convey during the disseisin;[3] but such livery was effective, if at all, only where the disseisee still had his right of entry as well as his right of action. Where the disseisee had only a right of action left, he had nothing to convey, for the common law doctrine against maintenance made the right of action non-assignable, but where he had his right of entry, that was sufficient interest in the land to enable him, by livery in law, to create a new right of entry in his feoffee,[4] even though the feoffor's own right of entry was not transferable.[5] Since

enough, for that is made in consideration of dower." Dyer 18 b. (On the dower point see 38 Edw. III, Pl. 11, stated in Poll. 53.) The very early English conveyancers were too careful to experiment.

In Littleton's time, therefore, the situation discussed in the text had not arisen, and Coke's subsequent failure to consider it is due to the fact that as he was not born until after the passage of the Pretended Title Act, he had no occasion to consider anything but the effect of that act.

[1] That is, of course, apart from the Pretended Title Act. Coke saw that a conveyance by a disseisee was prohibited by that act. Co. Litt. 369 a.

[2] 5 Encyc. of Laws of Engl., 330.

[3] A disseisee who, by continual claim, had recovered seisin from one who still continued in adverse possession, could undoubtedly convey by feoffment with livery in law. That sort of case, and cases where a disseisor of short occupancy, and a disseisee of short reoccupancy, conveyed to people powerful enough to get the better of their opponents gave rise to the Pretended Title Act.

[4] This new right of entry was really a power of attorney to enter. That was why it terminated on the feoffor's death, and moreover was why livery in law must be made by the party himself, though livery in deed could be given by attorney. Of course before a man could authorize another to enter, he must himself have at least a right of entry; but if he had that, then the power of attorney to enter which he gave to his feoffee by livery in law was irrevocable except by death. See Parsons *v.* Perns, 1 Mod. 91, where the marriage of the feoffor to the feoffee after a feoffment within view, and before entry, did not revoke the feoffee's power to enter under the feoffment.

[5] A disseisee's own right of entry seems to have been untransferable, because, in its nature, too slight a thing to survive transfer. Coke, to be sure, gives the reason for its non-assignability to be maintenance, but that does not explain it satisfactorily. Maintenance will explain the non-assignability of the disseisee's right of action, but nothing short of inherent incapacity for transfer, unless authorized by legislation, will explain the non-assignability of his right of entry. By statute in England, and many states of the United States, rights of entry have at last been infused with enough

at best, therefore, a disseisee could alienate by livery in law, only where he still had a right of entry, he could do so only in his lifetime and that of the disseisor, and not then if the disseisor enfeoffed another, and that other continued in possession a year and a day.[1]

And now a word about the other forms of adverse possession. Only abatement and intrusion were like disseisin in being terminable by entry, and only they, therefore, permitted of feoffment by livery in law. In discontinuance and deforcement there was only a right of action in the ousted party, to assign which would be maintenance. In abatement and intrusion, as in disseisin, the right of entry might be lost by the death of the abator or intruder,[2] and presumably by the feoffment of the abator or intruder and possession by the feoffee for a year and a day.

As the Statute of Uses was passed in 1535, five years before the Pretended Title Act, it is necessary to say a word here about conveyances operating under that statute. While a feoffment could have, and often did have, a tortious operation, all conveyances under the Statute of Uses were innocent, *i. e.*, like common law grants, such conveyances passed only that which the grantor had.[3] As the Statute of Uses operated only to transfer possession from one man to another, it could not give it to the second man unless the first man had it. Conveyances under the Statute of Uses could be effective, therefore, only where the covenantor or bargainor had actual possession, or his right to possession was undisputed. A feoffment to uses, made with livery in law, would doubtless pass the seisin of a disseisee if the feoffee actually entered or made due continual claim, but until the feoffee got the seisin under the feoffment, the Statute of Uses could not operate to give the seisin to the *cestui que use*. So a covenant to stand seised could

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vigor and capacity to be transferred effectually by will and by conveyance *inter vivos*.

[1] "If the disseisor died after one year's non-claim, the descent to his heir gave the heir the right of possession and took away the true owner's entry. The Statute 32 Hen. VIII, c. 33, requires five years' non-claim. The feoffee of a disseisor acquired title of possession . . . by one year's non-claim. The descent to his heir remains privileged as it was at common law; for the 32 Hen. VIII, c. 33, extends not to any feoffee of the disseisor immediate or mediate. Co. Litt. 256 a. The feoffee of a disseisor was favored; because he came innocently into the tenure by a solemn and public investiture with the lord's concurrence."— Lord Mansfield in Taylor d. Atkyns *v.* Horde, *supra*, at p. 108.

[2] 3 Bl. Com. 176. See note 5, p. 273, *supra*.

[3] Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101, 104.

have effect as a conveyance under the statute only where the covenantor was seised. So, under a bargain and sale deed, or under a bargain and sale lease (the kind used in conveyance by lease and release), possession could pass only where the bargainor had it. By conveyances under the Statute of Uses, therefore, the rightful owner could not pass title to his grantee while some third person wrongfully held the seisin.[1]

Prior to the Pretended Title Act, therefore, there could be no conveyance at common law of lands in the adverse possession of another, except where the true owner either (1) entered and made a feoffment on the land with livery in fact, or (2), in the case of abatement, intrusion and disseisin made a feoffment with livery in law before the death of the abator, intruder or disseisor (or before the expiration of a year and a day after feoffment by such a one), and thereafter during his life his feoffee either actually, or by making continual claim, entered; and no conveyance operating under the Statute of Uses could be effective unless the covenantor or bargainor had possession, or the feoffee to uses got seisin.

English Law After the Pretended Title Act of 1540.

In 1540 Parliament passed the Pretended Title Act. That act provided that no person should bargain, sell or obtain "any pretenced rights or titles," or take, promise, grant or covenant to have any right, title or interest in real property, unless the persons bargaining, selling, etc., their ancestors, or those under whom they claimed, should have been in possession of the real property, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the transaction, upon penalty that the seller, etc., and the buyer, etc., with knowledge of the lack of possession should each forfeit the whole value of the property, one-half to go to the king and one-half to the informant.[2]

[1] See Rawle, Covenants for Title, 5th ed., 63, and see the following cases under the Pretended Title Act: Doe d. Dunn *v.* McLean, 1 U. C. Q. B. 151; Doe d. Bouter *v.* Savage, 5 U. C. Q. B. 223; Doe d. Simpson *v.* Molloy, 6 U. C. Q. B. 302; Hopkins *v.* Ward, 6 Munf. (Va.) 38; See *v.* Grenlee, 6 Munf. (Va.) 303.

[2] 32 Hen. VIII, c. 9, § 2. "It will be observed that the first provision against buying or selling speaks of 'pretenced' rights or titles, while the second provision against taking any promise or covenant omits the word 'pretenced.' But in our opinion both branches of the section refer to the same class of rights and titles. . . . The question, therefore, is, what is a 'pretenced' right or title within the meaning of the statute. This term in our opinion applies either to a title for which in fact there is no foundation, or to a right or title which, though not fictitious, was not, as the law stood at the date of this enactment, capable of being conveyed. . . . All dealings with rights of

This statute ended all question as to the right of a disseisee to convey. Whatever may have been true before the statute, no one after it could convey during another's adverse possession so as to affect that other.[1]

The Pretended Title Act is often spoken of as an affirmance of the common law,[2] but it certainly went farther than the earlier law. By the earlier law a disseisor did not have to be in possession a year before making a conveyance, but after this statute he had to do so. By the earlier law a disseisee did not have to wait a year after he re-entered before conveying, yet by a literal construction of this statute he was required to do just that,[3] though a more liberal construction was advocated.[4] All that can possibly be meant by calling the act an affirmance of the common law is that maintenance was interdicted by the common law, and this statute was aimed at one form of maintenance. The mischief at which the act was aimed "was that individuals possessed of rights, real or pretended, transferred them to persons more able, or more disposed, than themselves to litigate them. This was considered to be a great evil."[5] Despite the opinion of Montague, C. J., to the contrary,[6] this statute really altered the common law, for it made bad some conveyances which at common law were good.

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entry, except by release to the person in possession, were, therefore, previously to the statute of 8 and 9 Vict., dealings with 'pretenced' rights and titles within the meaning of the act of Hen. 8."—Cotton, L. J., in Jenkins *v.* Jones, 9 Q. B. D. 128, 134-5.

By sec. 4 of the act, one in possession for the year could purchase pretenced titles or get them in any reasonable ways.

[1] Co. Litt. 369 a; Underwood *v.* Lord Courtoun, 2 Sch. & Lef. 65.

[2] Montague, C. J., in Partridge *v.* Strange, 1 Plowd. 77; Doe d. Williams *v.* Evans, 1 C. B. 717; Jenkins *v.* Jones, *supra*, at p. 135. See Hathorne *v.* Haines, 1 Greenl. (Me.) 238, 247; Bishop of Toronto *v.* Cantwell, 12 U. C. C. P. 607, 610.

[3] Hawkins' Pleas of the Crown, c. 86, § 16. But see Co. Litt. 369 a, *semble contra*, though Coke there says that if a disseisor die and the disseisee disseises the heir of the disseisor, the disseisee cannot convey for a year. Coke is supposed to be *contra* to Hawkins, because Coke says that if the disseisee release to the disseisor the latter may convey without waiting a year, Coke giving as a reason, that nobody is prejudiced by this action of the disseisor. The two can be reconciled by giving the better reason that by accepting a release from the disseisee the disseisor claims under him, and hence the disseisor and those under whom he claims have been in possession the year required by the statute.

[4] Whitesides *v.* Martin, 7 Yerg. (Tenn.) 383, 397; Kincaid *v.* Meadows, 3 Head (Tenn.) 188, 192, and see note 3, *supra*.

[5] Maule, J., in Doe d. Williams *v.* Evans, *supra*, at p. 726. So Slywright & Page's Case, 1 Leon. 166, 167.

[6] See note 2, *supra*.

In Mr. Rawle's excellent book on Covenants for Title, it is stated that under the Pretended Title Act and the English decisions about it "the offense of maintenance consisted not so much in taking a conveyance of the whole or part of a thing not vested in the party by whom it was made, as in taking it in consideration of assisting or maintaining a suit for its recovery," and that it is "well settled" in England that where the transfer is not made for the purpose of assisting or maintaining a suit the "mere fact of an adverse possession will not invalidate the conveyance."[1] But except as applied to the situation in England since the statute of 8 and 9 Vict., c. 106, sec. 6, making rights of entry alienable, the authorities do not bear out the statements. Where the grantor was out of possession, or if in possession he, or those under whom he claimed, had not been in for a year before the conveyance, the conveyance was void under the Statute 32 Hen. VIII, whether it was in fact made for maintenance or not.[2] This was clearly so where the grantee knew of the grantor's lack of possession.[3] In other words, the statute established a presumption which could not be rebutted that such a conveyance was made for maintenance; for as has pertinently been said: "The principal mischief contemplated by the act is the maintenance of an action by the purchaser upon the pretenced title. How is that mischief to be obviated except by making the conveyance void?"[4]

Under the Pretended Title Act, therefore, a conveyance was void if either the grantor was out of possession at the time, or the grantor, though in possession at the time, had not been in possession himself or by his ancestor, grantor, etc., for one year prior to the conveyance. What is meant by calling the conveyance void is uncertain under the English cases.[5] It would certainly seem that the conveyance was a nullity as far as the adverse possessor, his heirs and assigns were concerned,[6] yet as between the dispossessed grantor and his grantee the conveyance undoubtedly was good, for while "there can be no doubt that conveyances of titles are made void [by the Statute 32 Hen. VIII] to the extent

[1] Rawle's Covenants for Title, 5th ed. § 48.

[2] Doe d. Williams *v.* Evans, *supra*. See Smith *v.* Hall, 25 U. C. Q. B. 554, 556.

[3] Slywright and Page's Cases, Golds. 101; 1 Leon. 166. See Kennedy *v.* Lyall, 15 Q. B. D. 491, 495–6.

[4] Maule, J., in Doe d. Williams *v.* Evans, *supra*, at p. 721.

[5] Aubrey *v.* Smith, 7 U. C. Q. B. 213, 215 (1850). What cases we have are mainly concerned with forfeitures under the act.

[6] Doe d. Williams *v.* Evans, *supra*.

that is necessary to prevent the mischief which the act intended to remedy,"[1] that mischief was simply the maintenance of an action by the grantee against the adverse possessor, and was fully defeated by holding the conveyance void as to the adverse possessor. Under the earlier Act of 1 Richard II, c. 9, by which it was provided that feoffments made by disseisors to lords and other great men, to have maintenance should "be holden for none and of no value," it was held: "That feoffments of this kind are only void in respect to the disseisees, but that they are effectual between the feoffor and feoffee."[2] Such undoubtedly was also true of conveyances forbidden by the Pretended Title Act, but it is only in the American cases that the problem is worked out.

The Pretended Title Act, if not wholly repealed, has been robbed in England of most of its efficacy. In 1845 the Statute 8 and 9 Vict., c. 106, sec. 6, made rights of entry other than those for condition broken alienable by deed; and while the Statute 32 Hen. VIII may still forbid the sale of wholly fictitious titles, and render void the deed of one knowingly taking a wholly fictitious title, the Statute 8 and 9 Vict. makes valid every conveyance by a rightful owner who still has a right of entry, even if his lands are at the time of the conveyance in the adverse possession of another.[3]

American Authorities.

In the United States the distinction between disseisin and the other forms of adverse possession known to the old law has become obsolete.[4] We have even ceased to discriminate between disseisin and that adverse possession which will give title under the statute of limitations,[5] though the old common-law conception of

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[1] Maule, J., *Ibid.* at p. 727.

[2] Hawkins, P. C., c. 86, 418; Year Book, 27 Hen. VIII, p. 23, § b, 1. So Beaumont, J., said in Upton *v.* Basset, Cro. Eliz., 445: "A feoffment upon maintenance or champerty is not void against the feoffor, but against him who hath right."

[3] Jenkins *v.* Jones, *supra;* see Kennedy *v.* Lyall, *supra.* So under the Upper Canada Colonial Act of 14 and 15 Vict., c. 7, allowing the sale of rights of entry, it was held that while the sale of a right of entry could no longer be called a pretenced right, and the Statute 32 Hen. VIII was therefore so far repealed, the attempted conveyance by a party of a right which in fact he did not have, was still forbidden by the Statute. Baby *v.* Watson, 13 U. C. Q. B. 531.

A disseisee's right of entry was made devisable in England in 1837. Prior to that time such a right of entry was not devisable. 1 Jarman, Wills 49, 50.

[4] Smith *v.* Burtis, 6 Johns. Cas. (N. Y.) 197, 215.

[5] Pickett *v.* Doe, 74 Ala. 122, 131; Unger *v.* Mooney, 63 Cal. 586, 590; Magee *v.* Magee, 31 Miss. 138, 151–2. See Barrett *v.* Love, 48 Ia. 103, 111–12.

disseisin finds its expression in those states where possession is not adverse so as to give title, unless the one claiming adversely knows himself to be on another's land.[1] It is still possible, however, to say that a possession is adverse for one purpose and not for another.[2]

On the question of the right of the real owner of land to convey it while another is in its adverse possession, the states are divided. In several states the Statute 32 Hen. VIII, including the requirement of one year's possession, has been substantially re-enacted,[3] though in no state does the one year feature figure much in the decisions.[4] In several other states, either by statute or by decision, it is declared simply that a conveyance of land during a third person's adverse possession of it is void,[5] but in far the larger number of states the Statute 32 Hen. VIII, and the common-law doctrine of which it is supposed to be declaratory, are either abolished by statutes authorizing conveyances, notwithstanding there may be an adverse possession of the land,[6] or else on grounds of public policy

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[1] See Grube *v.* Wells, 34 Ia. 148; Mills *v.* Penny, 74 Ia. 172; Winn *v.* Abeles, 35 Kan. 85; Watrous *v.* Morrison, 33 Fla. 261; Finch *v.* Ullman, 105 Mo. 255; Chance *v.* Branch, 58 Tex. 490.

[2] "It is clear that possession may be adverse under the act of limitations without being adverse under the Champerty Act." Barret *v.* Coburn, 3 Met. (Ky.) 510, 514; Crary *v.* Goodman, 22 N. Y. 170; Fish *v.* Fish, 39 Barb. (N. Y.) 513; Smith *v.* Faulkner, 48 Hun (N. Y.) 186; Foxcroft *v.* Barnes, 29 Me. 128. But in Connecticut this is not so. Merwin *v.* Morris, 71 Conn. 555.

[3] 1 N. Y. Rev. Stat. 739, § 147; N. Y. Penal Code, § 130; N. Y. Code Civ. Pro., § 1501; N. Dak. Rev. Codes, § 7002 (Penal Code); Tenn. Code of 1896, §§ 3171–5.

In New York the Revised Statute makes the deed void and the Penal Code makes it a misdemeanor to buy or sell land of which the grantor, or those by whom he claims, have not been in possession for a year; but the Code of Civil Procedure allows the grantee to bring ejectment in the grantor's name.

[4] It may of course do so at any time.

[5] Alabama: Dexter *v.* Nelson, 6 Ala. 68; Pearson *v.* Adams, 129 Ala. 157. Connecticut: Gen. Stats. (1888) § 2966. Fla.: Reyes *v.* Middleton, 36 Fla. 99. Ind.: Steeple *v.* Downing, 60 Ind. 478. Ky.: Gen. Stats. c. 11, § 2. N. C.: Johnson *v.* Prairie, 94 N. C. 773. N. Dak.: Rev. Codes (1889), § 7002; Galbraith *v.* Payne, 12 N. Dak. 164. Okla.: Stat. (1893) § 6137.

[6] Ark.: Stat. (1884) c. 27, § 644. Cal.: Civil Code, § 1047. Colo.: 1 Mills Ann. Stats. § 431. Dist. of Columbia: Code (1902), § 513. Ga.: Code (1882), § 2695. Idaho: Civil Code (1901), § 2293. Ill.: 1 F. & C. Ann. Stat. c. 30, § 4. Iowa: McClain's Rev. Stats. (1888) § 3103. Kan.: Gen. Stats. (1889) § 1115. Me.: Rev. Stats. c. 73, § 1, and c. 104. Mass.: 2 Rev. Laws (1902), c. 127, § 6. Mich.: Rev. Stats. (1846) p. 263, § 71. Minn.: 1 Stats. (1878) c. 40, § 6. Miss.: Rev. Code (1880), § 1187. Mo.: 1 Rev. Stats. (1889) § 2400. Mont.: Comp. Stats. (1887) p. 663, § 268. Neb.: Consol. Stats. (1891) § 4355. Nevada: Gen. Stats. (1885) § 2603. Oregon: 2 Hills Ann. Laws (1887), § 3009. R. I.: Gen. Laws (1896), c. 202, § 11 (authorizing conveyances of rights of entry and of action and so changing the rule of Burdick *v.*

are held by the courts to be obsolete.[1] Most states started with the common-law doctrine. Several states and territories seem to have announced no rule or are uncertain.[2]

States Following the Common-Law Rule.

In those states where the common-law rule has prevailed, it has been held that so far as the adverse possessor and those in privity with him are concerned, the deed of an ousted owner is a nullity.[3] The deed is void no matter how good in fact the grantor's title was,[4] nor how bad the disseisor's,[5] and even if the disseisor originally entered by permission of the true owner.[6] The deed, however, does not work a forfeiture of the grantor's title,[7] and despite

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Burdick, 14 R. I. 574). S. Dak.: Rev. Codes (1903), p. 735, § 996. Utah: Rev. Stats. (1898) § 1980. Vt.: Stats. (1894) § 2240. Va.: Code of Va. (1887) § 2418. W. Va.: Code (1899), c. 71, § 5 (see Cassedy *v.* Jackson, 45 Miss. 397, 407). Wis.: Laws (1865), c. 365. Wyo.: Rev. Stats. (1899) § 2735.

[1] Cal.: (prior to statute) Lucas *v.* Pico, 55 Cal. 126, 128; see Mathewson *v.* Fitch, 22 Cal. 86. Del.: Doe d. Bright *v.* Stephens, 1 Houst. 31. D. C.: (prior to statute) Matthews *v.* Heyner, 2 App. Cas. 349. Ia.: (prior to statute) Wright *v.* Meek, 3 Greene 472; Foster *v.* Young, 35 Ia. 27, 40. Md.: Schaferman *v.* O'Brien, 28 Md. 565. N. H.: Farrar *v.* Fessenden, 39 N. H. 268 (so long as disseisee has a right of entry he can convey). N. J.: Den *v.* Geiger, 9 N. J. Law 225. Ohio: Hall *v.* Ashby, 9 Oh. 96. Penn.: Stoever *v.* Lessee of Whitman, 6 Binn. 416; Cressin *v.* Miller, 2 Watts 272. S. C.: Sims *v.* DeGraffenreid, 4 McCord 253. Tex.: Carter *v.* McDermett, 12 Tex. 545.

The most conspicuous case is South Carolina, where, despite the fact that the Statute 32 Hen. VIII, c. 9, was enumerated by the legislature in the table of statutes in force in the state, the courts said it was "inapplicable under our usages." Poyas *v.* Wilkins, 12 Rich. (S. C.) 420.

[2] Arizona, Louisiana, New Mexico, Washington. In Washington the deed of a record legal title holder passes to *bona fide* purchasers the full legal and equitable title, free from all claims not of record. 1 Hills Ann. Stats. § 1448. On the civil law which prevails in Louisiana, see White *v.* Gay's Executors, 1 Tex. 384.

[3] See 9 Cent. Dig. 2019, § 54. It is useless to multiply cases on this point. One of the latest is Galbraith *v.* Payne, 12 N. Dak. 164.

In Virginia the statute forbidding the conveyance of adversely held land (repealed in 1849) was construed so as to inflict a penalty without avoiding the conveyance (see Menemeyer *v.* Wright, 75 Va. 239, 245-6), but that doctrine was peculiar to Virginia. See note 4, p. 277, *supra*.

The doctrine of the text applies only to deeds. A contract for the sale of lands adversely held is not bad. Edwards *v.* Parkhurst, 21 Vt. 472. Though equity will rescind such a contract at the suit of the buyer. Williams *v.* Carter, 3 Dana (Ky.) 198. And the grantor's heirs may resist successfully a decree for its specific performance. Bryant's Heirs *v.* Hill, 9 Dana (Ky.) 67.

[4] Tomb *v.* Sherwood, 13 Johns. Cas. (N. Y.) 288.

[5] Jackson *v.* Todd, 2 Cal. (N. Y.) 183; Jackson *v.* Brinton, 12 Johns. Cas. (N. Y.) 452.

[6] Barry *v.* Adams, 3 Allen (Mass) 493.

[7] Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Brinley *v.* Whiting, 5 Pick. (Mass.) 348, 355, 359; Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101, 540.

it he may maintain ejectment against the adverse possessor, champerty being no defence to the adverse possessor when the grantor brings ejectment.[1] The grantee, however, cannot bring ejectment in his own name against the adverse possessor,[2] even though the great weight of authority is, that as between the parties to it the deed is good;[3] but in most states he may bring ejectment in the grantor's name, even if the grantor does not know of the action[4] and recovery will inure to the benefit of the grantee.[5]

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[1] Doe *v.* Roe, 37 Ga. 5; Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Jackson *v.* Vredenbergh, 1 Johns. Cas. (N. Y.) 159; Coogler *v.* Rogers, 25 Fla. 853; Sibley *v.* Alba, 95 Ala. 191; Green *v.* Cumberland, etc., Co., 110 Tenn. 35; Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Nason *v.* Blaisdell, 17 Vt. 216; Chamberlain *v.* Taylor, 92 N. Y. 348; Steeple *v.* Downing, 60 Ind. 478.

But see Luen *v.* Wilson, 85 Ky. 503, holding that the champertous deed must be rescinded by the grantor in good faith before he can sue.

And see Dever *v.* Hagerty, 169 N. Y. 481, holding that the grantor cannot maintain ejectment for the grantee against the adverse possessor after having released to the latter.

[2] Bream *v.* Cooper, 5 Munf. (Va.) 7; Prestwood *v.* McGowan, 128 Ala. 267; Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Coogler *v.* Rogers, 25 Fla. 853; Lillie *v.* Hickman, 25 S. W. Rep. 1062 (Ky.); Hoyle *v.* Logan, 4 Dev. (N. C.) 495; Wentworth *v.* Abbetts, 78 Wis. 63; Mead *v.* Fitzpatrick, 74 Conn. 521; Tabb *v.* Baird, 3 Call (Va.) 475.

The grantee cannot sue in his own name, even though he was ignorant of the adverse possession. Lowber *v.* Kelley, 17 Abb. Pr. 452.

[3] Coogler *v.* Rogers, 25 Fla. 853; Steeple *v.* Downing, *supra;* McMahan *v.* Bowe, 114 Mass. 140; Farnum *v.* Peterson, 111 Mass. 148; Pearson *v.* King, 99 Ala. 125; Luen *v.* Wilson, 85 Ky. 503 (but see Crowley *v.* Vaughan, 11 Bush (Ky.) 517); Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Den *v.* Geiger, 9 N. J. Law 225; Hamilton *v.* Wright, 37 N. Y. 502; Livingston *v.* Proseus, 2 Hill (N. Y.) 526; Edwards *v.* Roys, 18 Vt. 473; Middleton *v.* Arnold, 13 Gratt. (Va.) 489.

But see *contra* Williams *v.* Hogan, Meigs (Tenn.) 187; Green *v.* Cumberland, etc., Co., 110 Tenn. 35; Phelps *v.* Sage, 2 Day (Conn.) 151; Wentworth *v.* Abbetts, 78 Wis. 63; Graves *v.* Leathers, 17 B. Mon. (Ky.) 665; Cardwell *v.* Spriggs, 7 Dana (Ky.) 36.

[4] Cleverly *v.* Whitney, 7 Pick. (Mass.) 35; Coogler *v.* Rogers, *supra.*

[5] Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Coogler *v.* Rogers, *supra;* Edwards *v.* Parkhurst, 21 Vt. 472; Galbraith *v.* Payne, 12 N. Dak. 164; Hamilton *v.* Wright, 37 N. Y. 502; Sohier *v.* Coffin, 101 Mass. 179; Wilson *v.* Nance, 11 Humph. (Tenn.) 188; Den *v.* Geiger, *supra;* Steeple *v.* Downing, *supra;* Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Thompson *v.* Richards, 19 Ga. 594.

But see *contra* Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Key *v.* Snow, 90 Tenn. 663, *semble.*

In one state the deed is void as to the adverse holder, and yet by statute the grantee may sue the adverse holder in ejectment in the grantee's own name. Johnson *v.* Prairie, 94 N. C. 773; Osborne *v.* Anderson, 89 N. C. 261; see Campbell *v.* Equitable, etc., Co., 94 N. W. Rep. 401 (S. Dak.). And such will probably be held to be the result effected by code provisions allowing actions to be prosecuted in the name of the real party in interest. See Dever *v.* Hagerty, 169 N. Y. 481; Steeple *v.* Downing, *supra.*

The grantee must sue in the names of all his grantors. Hasbrouck *v.* Bunce, 62 N. Y. 475. But a remote grantee of a disseisee cannot even sue in the disseisee's name.

The disseisee's deed is good against all the world, except the disseisor and those in privity with him.[1]

It is generally held that the grantor may release to the adverse holder despite his conveyance,[2] though not after his grantee has commenced an action against the adverse possessor in the grantor's name,[3] and that the adverse holder, despite his knowledge of that conveyance, gets good title by the release, since the conveyance is as to him a nullity.[4] But the heirs of the disseisee are not allowed by release to keep the disseisee's grantee from suing the disseisor in their names.[5] Where the grantee knew of the adverse possession when he took his deed he cannot sue the grantor for releasing to the adverse holder,[6] and in the absence of fraud he cannot sue the grantor on the covenants in the latter's deed.[7] It seems, how-

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Smith *v.* Long, 12 Abb. N. C. 113. The grantor cannot prevent the grantee from suing in the grantor's name. Pearson *v.* King, 99 Ala. 125.

[1] McMahan *v.* Bowe, 114 Mass. 140; Galbraith *v.* Payne, 12 N. Dak. 164; Poor *v.* Horton, 15 Barb. (N. Y.) 485; University of Vt. *v.* Joslyn, 21 Vt. 52; Johnson *v.* Prairie, 94 N. C. 773; King *v.* Sears, 91 Ga. 577; Fort Jefferson Implement Co. *v.* Dupoyster, 51 S. W. Rep. 810 (Ky.); Livingston *v.* Proseus, 2 Hill (N. Y.) 526.

The intimation in a few cases that a disseisee who has conveyed while disseised and thereafter regains possession can convey a good title to a second grantee is disproved by White *v.* Patton, 24 Pick. (Mass.) 324; Farnum *v.* Peterson, 111 Mass. 148, 151.

[2] Everenden *v.* Beaumont, 7 Mass. 76; Dever *v.* Hagerty, 169 N. Y. 481; Adams *v.* Buford, 6 Dana (Ky.) 406; Sessions *v.* Reynolds, 7 Smedes & M. (Miss.) 130; Williams *v.* Council, 49 N. C. 206.

[3] Edwards *v.* Parkhurst, 21 Vt. 472; but see Swett *v.* Poor, 11 Mass. 549.

[4] Everenden *v.* Beaumont, *supra;* Swett *v.* Poor, *supra;* Dever *v.* Hagerty, *supra.* See also Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Tabb *v.* Baird, 3 Call. (Va.) 475; Betsey *v.* Torrance, 34 Miss. 132.

A release by the disseisee to the disseisor is not forbidden by the Statute 32 Hen. VIII, c. 9, nor by the common law, because such a release is really not a conveyance, but is rather an extinguishment of right; it simply keeps any one from saying that the disseisor's holding is unlawful, or that he has no right to convey. That is why the word "heirs" was not necessary at common law for the disseisee to release a fee to the disseisor. Co. Litt. 9 b. Where the disseisor consents to the conveyance by the disseisee the latter's grantee gets (even against the disseisor) the title the grantor had. Cameron *v.* Irwin, 5 Hill (N. Y.) 272; McIntire *v.* Patton, 9 Humph. (Tenn.) 447. So a conveyance by the disseisor to the disseisee's grantee gives the latter a title good against all the world. Ft. Jefferson Imp. Co. *v.* Dupoister, 51 S. W. Rep. 810 (Ky.).

[5] Pearson *v.* King, 99 Ala. 125, but see Swett *v.* Poor, *supra.*

[6] Swett *v.* Poor, *supra.* The grantee's knowledge or ignorance of the adverse possession seems to make no other difference except on the question of the penalties under the Statute 32 Hen. VIII. Ignorance will save the grantee from the penalty. Etheridge *v.* Cromwell, 8 Wend. (N. Y.) 629. See Sherwood *v.* Barlow, 19 Conn. 471; Varrell *v.* Holmes, 4 Me. 168; Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Pepper *v.* Haight, 20 Barb. (N. Y.) 429. That the penalties were not in force in Georgia, see Milsaps *v.* Johnson, 22 Ga. 105.

[7] Graves *v.* Leather, 17 B. Mon. (Ky.) 665; Walters *v.* Hutton, 85 Tenn. 109. But

ever, that the grantee can release to the disseisor and so perfect the latter's title,[1] or if he does not do that, can recover the land of the grantor if the latter regains possession.[2] Moreover, equity will not decree a rescission of the deed at the suit of the grantor[3] any more than it will enjoin an action by the grantor for the purchase money, or compel the return of consideration paid,[4] but in general will leave the parties to their legal remedies.

A deed may be void as to one piece of land adversely held, and good as to other pieces not so held.[5] In New York a deed of a large parcel not adversely held will pass title to a small part, not in the grantor's possession because of a disputed boundary line,[6] and to appurtenant rights in dispute;[7] and in Massachusetts, though in such case the title to the small part was held not to pass,[8] the grantee by removing the fence to the true line and remaining in possession could defend on his grantor's title.[9]

Adverse possession, moreover, need not have existed for any special time to make a deed bad; it is enough that it exists at the

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see Farnum *v.* Peterson, 111 Mass. 148, 151, where there is a *dictum contra*, and see Crowley *v.* Vaughan, 11 Bush (Ky.) 517.

[1] Farnum *v.* Peterson, *supra.*

[2] Coogler *v.* Rogers, 25 Fla. 853. The traditional statement that the title remains in the grantor, but that as between himself and his grantee he is estopped to deny that it has passed to the grantee (see Farnum *v.* Peterson, *supra*, at p. 151; 4 Kent Com. 448) should be abandoned. The true way of looking at it is to say that the title has passed to the grantee, but that the adverse holder cannot be prejudiced by that fact and cannot use it as a defence to an action of ejectment brought by the grantor.

[3] Ruffin *v.* Johnson, 5 Heisk. (Tenn.) 604. It has also been held that equity will set aside the conveyance at the suit of the adverse holder, but will not vest the fee in the latter. Wellman *v.* Hickman, 1 Smith (Ind.) 407.

[4] Woodworth *v.* Janes, 2 Johns. Cas. (N. Y.) 417; Miller *v.* Mulvey, 7 Ky. Law. Rep. 40. See Waters *v.* Hutton, 85 Tenn. 109.

[5] Goodman *v.* Newell, 13 Conn. 75; McSpadden *v.* Starrs Mtn. Iron Co., 42 S. W. Rep. 497 (Tenn.); Slatton *v.* Tenn. Coal, etc., Co., 109 Tenn. 415; Towle *v.* Smith, 2 Robt. (N. Y.) 489.

But the grantee may nevertheless be prosecuted for maintenance (Varrell *v.* Holmes, 4 Me. 168) and the penalty recovered for the part adversely held. Hyde *v.* Morgan, 14 Conn. 104.

[6] Danziger *v.* Boyd, 120 N. Y. 628; Clark *v.* Davis, 28 Abb. N. C. 135; Allen *v.* Welch, 18 Hun (N. Y.) 226. See Norwalk Heating, etc., Co. *v.* Vernon, 75 Conn. 662, where an adjoining structure projected over the land. And see Laverty *v.* Moore, 33 N. Y. 658; Small *v.* Hamlet, 68 S. W. Rep. 395 (Ky.), in accord with New York; Percifull *v.* Coleman, 72 S. W. Rep. 29 (Ky.).

[7] Corning *v.* Troy, etc., Factory, 40 N. Y. 191.

[8] Boston, etc., R. R. Co. *v.* Sparhawk, 5 Met. (Mass.) 469. See Watrous *v.* Morrison, 33 Fla. 261, 282, *accord.* Of course under the present Massachusetts statute it would pass. 2 Rev. Laws (1902) c. 127, § 6.

[9] Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76; Sparhawk *v.* Bagg, 16 Gray (Mass.) 583.

time the deed is delivered.[1] So where the year's possession is not required, the adverse possession need not have been ended for any particular length of time to make the deed good; and therefore, where the disseisee peaceably enters upon the land and there delivers the deed, the grantee gets the title despite the adverse possession.[2] The entry restores the seisin to the disseisee sufficiently to pass title against the disseisor as well as against others.[3] So where the disseisor abandons the land and the disseisee's grantee enters, or the grantee enters on the land when it is vacant, it seems that the grantee's title becomes indefeasible.[4]

A grantee who knows of the adverse possession may yet get title by relation under his deed if it was executed in pursuance of a binding contract entered into before there was any adverse possession.[5] The fact, however, that a grantee does not actually know of an existing adverse possession does not give him title as against the disseisor, for the adverse possession is constructive notice;[6] furthermore, the disseisee, having only a right of entry and a right of action, cannot pass them as against the disseisor.

States Abrogating the Common-Law Rule.

In those states where the Statute 32 Hen. VIII, c. 9, and the common-law rule have been abrogated, there can be no doubt that a disseisee transfers to his grantee both his right of entry and his right of action.[7] In such states the grantee can sue wherever his grantor could,[8] and it is held that the grantee, acquiring no more

[1] Cornwell *v.* Clearing, 87 Hun (N. Y.) 50; Green *v.* Cumberland, etc., Co., 110 Tenn. 85; Sohier *v.* Coffin, 101 Mass. 179; Logan *v.* Phenix, 66 S. W. Rep. 1042 (Ky.); Snyder *v.* Church, 70 Hun (N. Y.) 428; Kincaid *v.* Meadows, 3 Head (Tenn.) 188; Howard *v.* Howard, 17 Barb. (N. Y.) 663.

[2] Warner *v.* Bull, 13 Met. (Mass.) 1; Farwell *v.* Rogers, 99 Mass. 33; Birthright *v.* Hall, 3 Munf. (Va.) 536.

[3] But this is not so where the grantor has lost his right of entry before going on the land. Foster *v.* Abbott, 8 Met. (Mass.) 596.

[4] McMahon *v.* Bowe, 114 Mass. 140, *semble;* Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76, 82; Snow *v.* Orleans, 126 Mass. 453. See Leach *v.* Woods, 14 Pick. (Mass.) 461; Wade *v.* Lindsey, 6 Met. (Mass.) 407.

[5] Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81; Harral *v.* Leverty, 50 Conn. 46; Middlesborough, etc., Co. *v.* Neal, 105 Ky. 586; Cardwell *v.* Spriggs' Heirs, 7 Dana (Ky.) 36.

[6] Jackson *v.* Demont, 9 Johns. Cas. (N. Y.) 55; Bernstein *v.* Humes, 71 Ala. 260; Lowber *v.* Kelly, 17 Abb. Pr. 452. *Contra*, Sewall *v.* Draughn, 44 S. W. Rep. 210 (Tenn.).

[7] The Massachusetts statute is expressly so worded. Stats. of 1891, c. 354. That title passes, see Walden *v.* Gratz, 1 Wheat. (U. S.) 292.

[8] Conn's Heirs *v.* Manifee, 2 A. K. Mar. (Ky.) 396; Young *v.* Kimberland, 2 Litt.

and no less than his grantor had, takes subject to the statutes of limitation which had begun to run against the grantor.[1] While under our modern procedure the grantee can sue the disseisor in the grantee's own name, his right of action is really founded on his grantor's seisin and must be so regarded wherever that fact is material; for it is the grantor's right of entry and right of action that he owns and exercises. Indeed, that is why the grantee takes subject to the equities of the open adverse holder wherever possession is notice.[2]

In closing, some explanation should be offered of the fact that in a number of our states the old doctrine in some form still survives. Indeed, it receives vigorous support in one of our newest states.[3] Perhaps the best explanation is that given for the Tennessee statutes. Of them it has been said: "It was no fear of nobles or great men or their influence with courts and juries that produced these Tennessee statutes . . . but it was the hostility of public sentiment to the 'land sharks' who were speculating in litigation over defective titles, and particularly to lawyers lending themselves to this speculation for profit, which provoked statutes seeking to enlarge the English acts just because they did not reach the evil sought to be suppressed."[4] Whatever the reason, the old doctrine retains, and for some time will retain in several states, considerable vitality.

George P. Costigan, Jr.

LINCOLN, NEBRASKA.

(Ky.) 223; Austin *v.* Stevens, 24 Me. 520; Dillon *v.* Dougherty, 2 Grant Cas. (Pa.) 99; Chicago *v.* Vulcan Iron Works, 93 Ill. 222. This is so even though the deed was given just to enable him to sue in the federal courts. King *v.* Sears, 91 Ga. 577.

[1] Shortall *v.* Hinckley, 31 Ill. 219.

[2] Hadduck *v.* Wilmarth, 5 N. H. 181.

[3] See Galbraith *v.* Paine, 12 N. Dak. 164.

[4] Byrne *v.* Kansas City, etc., R. R. Co., 55 Fed. Rep. 44, 47 (Circ. Ct., W. D. Tenn.).